

OUTCOMES FROM THE SENIOR MANAGEMENT REVIEW TEAM

INTRODUCTION

On April 14, 2000, the U.S. Nuclear Regulatory Commission (NRC) Executive Director for Operations (EDO) established a task group to evaluate the NRC processes for handling discrimination cases. The Discrimination Task Group (DTG) was to: (1) evaluate the Agency's handling of matters covered by its employee protection standards; (2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate; (3) ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise concerns in accordance with the Agency's employee protection standards; and (4) promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

The EDO established a Senior Management Review Team (SMRT) to review the final recommendations of the DTG, when it was completed. The SMRT was assembled to review the final report and provide any additional perspectives that could enhance the potential options for Commission consideration. The SMRT consisted of the Deputy Executive Director for Reactor Programs, the Deputy Executive Director for Materials, Research and State Programs, the Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Region II Administrator. In addition, the Associate General Counsel for Hearings, Enforcement, and Administration served a legal advisor to, and adjunct member of, the SMRT.

The final report from the DTG was published in April 2002, and is provided as Attachment 1. The SMRT reviewed the report and convened an off-site meeting from June 13 to 14, 2002, to evaluate the DTG's recommendations, discuss various perspectives of the Agency's discrimination program, and develop conclusions, endorsements, and opinions with respect to the DTG recommendations.

The SMRT concluded that a rulemaking to establish a regulation addressing a Safety Conscious Work Environment (SCWE), which incorporates the elements of the Agency's current employee protection regulations, is warranted. The SMRT believes that a fundamental change in approach is needed in order to move the employee protection program from a reactive function, which relies on the investigation and enforcement program, to a pro-active one relying on the inspection program to measure licensee performance in achieving and maintaining employee protection through a SCWE.

In arriving at its conclusion, the SMRT considered the DTG findings and recommendations, the Commission's broad direction for NRC's programs to evolve into more a risk-informed / performance-based framework, the Commission's policy for clarity and predictability in NRC's regulatory programs, the licensees' experiences with implementing Employee Concerns Programs (ECPs), and stakeholder comments on NRC's process for handling discrimination complaints. The SMRT's evaluation of the Agency's program for handling discrimination relied heavily on the decision-making logic put forward by the DTG.

The following is a summary of the SMRT deliberations, along with the rationale that supports its conclusions.

DISCUSSION OF KEY TOPICS

At the outset, the SMRT challenged itself to evaluate all aspects of the DTG's decision flow chart (Attachment 1, page iv) in the context of the Agency's strategic goals, along with the Commission's broad direction for NRC's regulatory programs to evolve into a risk-informed / performance based framework. The SMRT considered that while Option 1¹ of the flow chart is an option for deliberation, implementing it would result in an unacceptable reduction in public confidence, given the Agency's long-standing position regarding the importance of employee protection.

A SCWE rule is seen primarily as a framework for addressing potential safety concerns nearest to where the licensed activities occur, and reinforcing that the responsibility for the safe operation of a facility rests with the licensee. The SMRT also considered that using the enforcement process to address discrimination complaints, as is currently done, and as a vehicle-of-change to encourage a SCWE, results in the NRC bearing the responsibility for a very resource-intensive programmatic framework for administering discrimination complaints along with promoting a SCWE with licensees.

As a result, the SMRT addressed a broader question, while examining the DTG's Policy Decisions 1 and 2:

How should the NRC approach regulation in the area of SCWE, including the handling of discrimination complaints, the Agency's goals, and a licensee's roles and responsibilities in assuring a SCWE?

The SMRT concluded, after deliberation, that the best approach for encompassing both goals in the above question was rulemaking to require a SCWE, which would include, as appropriate, the current employee protection provisions as attributes.

The SMRT recognized that the Commission had previously considered a SCWE rulemaking and determined that it was not needed. Recent efforts (1996 to 1998) to develop a standardized approach to assess a SCWE were proposed and subsequently withdrawn. A principal objection to the earlier effort was that it imposed additional requirements going beyond the existing employee protection regulations. However, several factors have changed since that decision, which prompted a reconsideration of the SCWE rulemaking prospect. These factors include the implementation of the Reactor Oversight Program (ROP), further experience with licensees initiating Employee Concerns Program (ECP) efforts, development of an international program addressing safety culture, the Agency's desire for clarity and predictability in its programs, and the Agency's strategic goals.

¹Decision Flow Chart Option 1: Eliminate NRC's discrimination regulations and discontinue review and assessment of the Safety Conscious Work Environment (SCWE).

In addition, some comments from licensee stakeholders focused on the resource burden that NRC's investigations of discrimination complaints impose on the licensed community. The SMRT concluded that rulemaking in the area of SCWE was an important step at this point, and recognized that any rulemaking in this area should incorporate elements of 10 CFR 50.7 (and its analogous regulations). A SCWE rulemaking would provide a means of reducing the burden on licensees caused by NRC investigation of discrimination complaints, by having the licensed community create and maintain effective ECPs. The licensees would be able to manage their internal resources to achieve the requirements of a new rule, rather than expend resources to address an NRC investigation. Since many of the reactor licensees have begun implementing ECPs on their own, there would be little additional effort needed to implement this aspect of a SCWE rule.

The SMRT also recognized that the time frame associated with rulemaking would not produce the needed programmatic changes in the short term, and concluded that interim modifications to the current process would be appropriate to address stakeholders concerns and promote a transition into a SCWE rule.

SCWE Rulemaking

The SMRT continued to examine the DTG's decision flow chart and deliberated on approaches for a SCWE rulemaking. Two approaches for addressing both the SCWE and discrimination complaints were evaluated by the SMRT:

Approach 1 - Eliminate NRC's discrimination regulations, totally defer all discrimination activities to U.S. Department of Labor (DOL), and develop a rule only addressing SCWE (DTG Option 2b, Attachment 1).

Approach 2 - Develop a SCWE rulemaking, which, as appropriate, incorporates NRC's current employee protection regulations as attributes.

The SMRT and the DTG viewed Approach 1 as having a potentially negative impact on public confidence, since the NRC might be perceived as shedding a long-standing regulatory role of protecting whistleblowers. NRC was concerned about the ability of licensee employees to freely raise safety concerns even before the DOL received its legislative mandate to do so, under section 211 (previously section 210) of the Energy Reorganization Act of 1974. Past congressional testimony from former NRC Chairmen has reinforced NRC's strong interest in employee protection matters as an element of public health and safety. In addition, some members of the public perceive a gap between the NRC and DOL's discrimination programs, because the DOL currently does not see all the complaints being brought forward, while NRC's program investigates all complaints associated with protected activities as long as a *prima facie* case can be established. Terminating NRC's role would also be difficult, partly due to public perception that nuclear industry activities involve more risk than other industries and additional measures to protect whistleblowers are needed to protect public safety.

The SMRT viewed Approach 2 as maintaining public confidence, as long as interim measures would be put in place to address public and other stakeholder concerns, while the rulemaking process was completed. A SCWE rule will recast NRC's role in handling discrimination complaints

from one of being reactive, (i.e., waiting until complaints surface then investigating and causing needed change through enforcement), to one of being pro-active, (i.e., having the licensee establish a program and NRC performing oversight through its inspection program to ensure the licensee implements a program that meets the Agency's regulations).

The vision is a system in which licensees would implement strong SCWE programs, NRC would inspect, and any residual discrimination complaints would be handled by DOL's process. This approach would bring the nuclear industry into closer alignment with how discrimination complaints are handled in other industries and would eliminate the perception of dual regulation of discrimination complaints by NRC and DOL. Nonetheless, the Agency's regulation in this area would continue to be unique in that it would address a SCWE by rule. NRC's role would evolve into focusing on the effectiveness of the licensee's SCWE program as a way to pro-actively assure discrimination complaints are handled properly. This is consistent with the licensee's primary responsibility to protect public health and safety, and with the NRC's overall regulatory approach.

The SMRT envisions that the rulemaking will result in fully implemented SCWE programs (including employee protection) at licensees with large workforces, such as nuclear power plants. Larger materials licensees, for example gaseous diffusion plants and nuclear fuel fabricators would also implement SCWE programs. These programs would be inspected by NRC during the course of routine inspections at those facilities. Potential programmatic weaknesses would be addressed through NRC's oversight process. The result would be a licensee-administered program that would address discrimination complaints, either internally, or by DOL. Potential higher-severity-level complaints (SL III or greater) could still be investigated by the NRC.

Licensees with small workforces, for example some Independent Spent Fuel Storage Installations and most materials licensees, would not be required to develop and maintain extensive employee protection programs. Smaller licensees would be required to post a revised NRC Form 3 - Notice to Employees, describing NRC's employee protection requirements and the elements of a SCWE to managers, as well as appropriate SCWE training for managers and employees on how to file potential discrimination complaints with the DOL or the NRC. Any potential low-severity-level (SL IV) discrimination complaints received by the NRC would be referred back to the licensee for action, with the whistleblower's consent, or the whistleblower will be encouraged to file a complaint with the DOL. The NRC may perform a follow-up with the licensee during a routine inspection to determine if a weakness exists in the licensee's SCWE. The designation of various licensee categories, based on the number of employees, would be determined as part of the rulemaking.

In Staff Requirements Memorandum SECY-99-002, the Commission disapproved the staff's prior proposal to designate the NRC employee protection requirements as compatibility category C for Agreement States. Those requirements that relate to Agreement States remain as compatibility category D, not required for purposes of compatibility. As such, Agreement States have not adopted NRC's employee protection provisions as a matter of Agreement State compatibility. The Commission also required the staff to inform the Commission of any regulatory performance gap, now or in the future, that puts Agreement State licensee employees at a higher risk than NRC licensee employees as a result of the present compatibility category. To date, the staff does not

have any information indicating that Agreement State licensee employees are at higher risk than NRC licensed employees.

The SMRT did not see the need to change the compatibility category for employee protection during the interim period. The DOL requirements for employee rights and protection and Occupational Safety and Health Administration (OSHA) requirements remain in force over Agreement State licensees. The posting of those employee protection requirements by Agreement State licensees is a compatibility category C for Agreement States. The proposed requirement for a SCWE, by rule, would be a matter for Agreement State compatibility. However, the SCWE rule would promote graded implementation, based on the size of the workforce at a licensed entity. Only the larger NRC licensees would be required to establish and maintain robust SCWE programs, which would address NRC's employee protection requirements. Smaller licensees would be held only to posting and training requirements. For Agreement State licensees, the comparable SCWE requirements would likewise require the larger entities to establish and maintain a robust SCWE, which would encompass the employee protection provisions from the DOL. The smaller Agreement State licensees would be held to posting and training requirements, which are currently in force.

Interim Measures

The SMRT considers a transition through an interim program to be an important step in achieving a fully functional SCWE rule. As part of its charter, the DTG conducted several interactions with stakeholders and compiled a listing of Stakeholder Comments and Concerns. The DTG grouped these comments and concerns into three categories: Major Crosscutting Policy Issues, Common Option Attributes, and Additional Comments and Changes Considered. The SMRT reviewed the DTG's evaluation of stakeholder comments and its recommendations for each item. The SMRT concluded that all but three of the DTG's recommendations for the Major Crosscutting Policy Issues, the Common Option Attributes, and the Additional Comments should be implemented as streamlining measures for addressing stakeholder concerns, while a SCWE rule is being codified.

The SMRT did not agree completely with the DTG's recommendations for Common Option Attribute 2, Common Attribute 4, and Additional Comment 1. In addition, the SMRT considered that NRC should establish threshold criteria for handling discrimination complaints in the interim period as a means of transition from the current discrimination prevention program to the one established by the SCWE rule. A short description of these issues, along with a comparison between the DTG and the SMRT recommendations are provided in the following table:

Table 1 STAKEHOLDER COMMENTS AND CONCERNS			
Major Crosscutting Policy Issues		Common Option Attributes	
1. Should NRC decriminalize the employee protection regulations? DTG: Impractical, decriminalizing employee protection regulations would not have desired effect, since criminal sanctions remain under willful misconduct rule. SMRT: Agrees with DTG recommendation moreover, criminal treatment is a result of statutory provision.		1. Should NRC provide discrimination allegations of low significance to the licensee for information, with whistleblower consent? DTG: Recommends providing, with the consent of the whistleblower, allegations to the licensee if no NRC investigation will be conducted. SMRT: Agrees with DTG recommendation. [OI recommends that an in-depth, personal interview of the alleged be conducted by OI to aid in the significance determination and to enhance public confidence.]	
2. Should NRC release Office of Investigations (OI) reports prior to the final Agency action? DTG: Recommends releasing OI reports and supporting documentation before any enforcement conference. Reports would have to be redacted to remove personal privacy information. SMRT: Agrees with DTG recommendations but would initially limit release just to the OI report. Information technology should be explored to gain efficiencies for redacting information before releasing associated documents. [OI recommends not releasing the OI reports or the supporting documentation until after the enforcement conference.]		2. Should NRC centralize the enforcement process? DTG: Recommends modifying the enforcement process for discrimination cases so that it is centralized in the Office of Enforcement. SMRT: Does not agree with DTG recommendation. SMRT believes that centralization removes parties familiar with the issues from the process. The DTG recommendation is also inconsistent with the President's directive to place decision making closer to the regulated entity. [OI recommends that the enforcement process should be centralized in the Office of Enforcement.]	
3. Should NRC grant hearing rights for Notice of Violations (NOVs)? DTG: Recommends that the current practice should not be expanded to include hearing rights for NOVs. SMRT: Agrees with DTG recommendation.		3. Should NRC resequence the enforcement conference? DTG: Recommends resequencing the enforcement conference to follow the issuance of the proposed action, and providing the OI report and associated documents before the conference. SMRT: Agrees with DTG recommendation, but would initially limit the document release just to the OI report. Information technology solutions should be explored to gain efficiencies for redacting information before releasing associated documents.	
4. Should NRC modify the regulations to allow imposing civil penalties to contractors? DTG: Recommends rulemaking to allow the imposition of civil penalties against contractors for violation of NRC requirements. SMRT: Agrees with DTG recommendation.		4. Should OGC perform a legal review of the sufficiency of the evidence prior to releasing OI Reports? DTG: Recommends that OGC perform a legal review of all substantiated discrimination cases before the OI report is issued. SMRT: The SMRT recommends that this attribute be combined with Common Options Attribute 5.	

Table 1 STAKEHOLDER COMMENTS AND CONCERNS			
Major Crosscutting Policy Issues		Common Option Attributes	
5. Should NRC consider using Alternative Dispute Resolution (ADR) in the discrimination process? DTG: Recommends evaluating the use of ADR techniques at various points in the investigation and enforcement process. SMRT: Agrees with DTG recommendation, with the caveat that application of ADR should depend on the level significance of the complaint.		5. Should NRC perform an assessment of the OI investigative techniques used in discrimination investigations? DTG: Recommends that an assessment be performed of the techniques used by OI in conducting investigations into allegations of discrimination. SMRT: Agrees with DTG recommendation. However, SMRT considers that this should be performed as part of OI's internal self assessment.	
6. Should NRC eliminate deferral to the Department of Labor (DOL)? DTG: Recommends eliminating the deferral of cases to DOL. SMRT: Agrees with DTG recommendation.		6. Should NRC modify the criteria for assessing Severity Level factors? DTG: Recommends changing the severity level criteria by considering more factors than the level of the person in the organization. SMRT: Agrees with DTG recommendation.	
7. Should NRC increase the penalties for engaging in discrimination? DTG: Recommends no change. Believes the current process ensures that corrective actions are taken and provides adequate deterrent to prevent future discrimination. SMRT: Agrees with DTG recommendation.		7. Should NRC allow the whistleblower to bring two attendees to the enforcement conference? DTG: Recommends raising the limit on the number of individuals the whistleblower can bring to the enforcement conference to two. SMRT: Agrees with DTG recommendation.	
		8. Should NRC provide financial support to whistleblowers to attend enforcement conferences? DTG: Recommends that NRC determine if it is feasible to reimburse the whistleblower and a personal representative's travel expenses to attend the conference. SMRT: Agrees with DTG recommendation.	

Table 1 STAKEHOLDER COMMENTS AND CONCERNS		
Major Crosscutting Policy Issues	Common Option Attributes	
	9. Should NRC consider more factors to determine civil penalty amounts? DTG: Recommends the enforcement policy should be reviewed to ensure no statements imply that a personnel action is required in response to a violation, consideration given to use the statutory maximums for each day a violation existed for egregious violations, and reconsider base penalty amounts for large companies to ensure meaningful deterrents.	SMRT: Agrees with DTG recommendation.
	10. Should NRC implement specific time limits for scheduling and conducting the enforcement conference? DTG: Recommends establishing two dates for the conference, within 60 days of releasing the OI report. There should be no changes in the conference date, except under limited circumstances.	SMRT: Agrees with DTG recommendation.
	11. Should NRC change the practice of allowing post-conference submittals? DTG: Recommends that post-conference submittals, other than the licensee's response to a NOV, not be accepted.	SMRT: Agrees with DTG recommendation.
ADDITIONAL COMMENTS AND CHANGES CONSIDERED		
1. Should licensees provide employee protection training (Union of Concerned Scientists Petition for Rulemaking)? DTG: Recommends denying the petition for rulemaking.	SMRT: Although the DTG was chartered to address this issue, the SMRT believes this is not the proper forum for addressing the petition for rulemaking.	
2. Should NRC pursue enforcement action for false discrimination complaints? DTG: Recommends the Agency consider the specific facts of any given case and use this only in egregious cases.	SMRT: Agrees with DTG recommendation.	

Existing discrimination cases, at the time a SCWE rule is approved, would continue to be processed in the current system to conclusion. Only new discrimination cases would be processed using the threshold criteria. Discrimination complaints provided to the NRC will be initially processed by an Allegation Review Board (ARB) for a determination of the potential severity level. Potential low-severity level (SL IV) cases would be referred back to the licensee, with the whistleblower's consent; or the whistleblower would be encouraged to file a complaint with the DOL. Potentially higher-severity level cases (SL III or higher) would be investigated by the NRC. NRC's oversight programs would track the disposition of those cases referred back for licensee action, as a means of monitoring the effectiveness of the licensee's program. Any identified weaknesses would be addressed through the routine inspection programs.

What do Stakeholders gain from this approach?

The SMRT viewed the solution for improving employee protection as one of making broad improvements to the work environment by realigning the programmatic responsibilities for employee protection back to the licensee, rather than trying to drive needed improvements through the enforcement and resolution of individual cases over a long period of time.

The SMRT believes that public stakeholders may initially perceive this approach as NRC shedding its long-standing responsibilities for employee protection. However, the SMRT considers that this perception would change, as the public understands the details of the approach and recognizes that NRC's goal is a wholesale improvement of the work environment with NRC retaining oversight throughout the process. This approach gives stakeholders a more public process through an established program, rather than waiting until transgressions occur and driving change through enforcement actions.

Industry stakeholders have been generally opposed to a SCWE rule, because of the perception of an additional burden imposed by a rule. However, the industry has also asserted that the current program places an undue resource burden on licensees to address NRC investigations of discrimination complaints. Rulemaking would allow licensees to manage their internal resources to achieve the requirements of a new rule, rather than expend resources to address an NRC investigation. Many of the reactor licensees have already begun implementing ECPs on their own. Therefore, we would expect that there should be little additional effort needed to implement this aspect of a SCWE rule by those licensees. The SMRT considers that there may be support from other industry stakeholders for NRC taking a graded approach to implementing a SCWE rule, and also support for NRC using threshold criteria for investigating discrimination complaints.

By implementing the streamlining measures outlined in Table 1, as part of the transition into a SCWE rule, public and industry stakeholder concerns over the timeliness of the current process should be alleviated.

What does NRC gain from this approach?

This framework will allow consideration of risk-informed and performance-based insights for implementing a SCWE. Thus, safety will be maintained at licensed operations.

The licensee's SCWE program will promote early identification of discrimination issues and enhance early resolution of complaints. The program should be preventive of discrimination complaints, rather than mitigative and corrective of complaints. By applying a threshold based on the severity level of the complaint, the number of discrimination cases forwarded to the NRC for investigation should be reduced, making the handling of discrimination complaints more effective and efficient.

The NRC will not be eliminating employee protection requirements from its regulations. The SCWE rule will provide a graded approach for implementing employee protection programs and a threshold for investigating discrimination complaints. The NRC will remain in an oversight role and investigate the higher severity level complaints that may be indicative of broader, more fundamental programmatic issues. This should maintain public confidence that NRC will still be addressing employee protection cases.

The SCWE rule may be viewed by industry as an unnecessary burden. However, the current program places a significant investigative and enforcement burden on the NRC. The proposed rule will shift the burden of maintaining employee protection from the NRC to the licensed community, in the context of a SCWE. The work environment can be monitored and enhanced more effectively through NRC's oversight before concerns arise, rather than trying to achieve a similar goal through individual enforcement actions after discrimination complaints surface. NRC has traditionally viewed whistleblower protection as a safety concern, which is a necessary burden. The ultimate responsibility for safety at a licensed facility has always rested with the licensee. Shifting the burden of employee protection to a licensee's SCWE program provides a proper alignment with the licensee's principal responsibility for the safe operation of licensed activities.

CONCLUSIONS

The SMRT concluded there are four options for Commission consideration on changing the way the Agency handles discrimination cases.

Option 1 - Eliminate NRC employee protection regulations and discontinue review and assessment of the SCWE (DTG Option 1, Attachment 1).

Option 2 - Revise the investigative thresholds for Office of Investigations (OI) investigations of discrimination complaints (DTG Option 5b, in Attachment 1).

Option 3 - Rulemaking for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency (SMRT conclusion).

Option 4 - Continue with current program, adopt recommendations for streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).